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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF QWEST CORPORATION'S)	
MOTION FOR AN ALTERNATIVE PROCEDURE)	CASE NO.
TO MANAGE ITS SECTION 271 APPLICATION.)	USW-T-00-3
_____)	

**QWEST'S RESPONSE TO THE MOTION OF
TOUCH AMERICA, INC. TO RE-OPEN ISSUES**

Qwest Corporation ("Qwest"), through undersigned counsel, hereby responds to the motion of Touch America, Inc. ("Touch America") to Re-Open Issues.

DISCUSSION

Two days before the Commission considers whether to issue a final decision on Qwest's application for 271 approval, Touch America, which is not a CLEC in Idaho, filed a motion to re-open issues long since resolved in order to stay these proceedings. Touch America has demonstrated no basis for submitting its belated motion, which is untimely under Commission Rules. *See* IDAPA 31.01.01.256 (Rule 256). The Commission should not tolerate Touch America's eleventh hour attempt to de-rail these proceedings on the eve of a final decision. Touch America's suggestion that the seriousness of this issue has just come to its attention is disingenuous at best. Touch America has threatened to file a complaint with the FCC since mid-

2000. It filed its initial complaint (which was not accepted because of deficiencies in following the FCC's rules) in February 2002.

A. The Commission Should Not Stay this Proceeding Based on Unresolved Complaints Before the FCC.

Touch America's motion does not allege Idaho-specific conduct but appears to be a tactic to further litigation pending before the FCC. The FCC has not rendered a decision on Touch America's complaints so it would be inappropriate to deny 271 relief on the basis of those pending complaints. The Montana Public Service Commission so found in February 2002, when Touch America attempted to interrupt that state's public interest CLEC forum.

Touch America(TA) recently complained to the FCC that Qwest violates Section 271 of the 1996 Act. . . .The Commission will not pass judgment on the complaint. As this complaint is before the FCC, the FCC is the proper regulatory body to decide this complaint and the complaint's significance vis-à-vis Qwest's expected 271 bid.¹

Moreover, a close reading of Touch America's motion suggests that its primary purpose in raising these issues before this Commission is to preserve a right to raise these issues before the FCC when Qwest files its formal application. For example, Touch America states that "[t]he FCC has explained that checklist item concerns *should not be raised for the first time during the FCC's review of a 271 Application*" pg. 4 of *Touch America's motion* (emphasis added); and, "Touch America presents facts regarding these three important issues to this Commission, the *proper initial forum* to address such concerns." (*Id.*) Stated another way, Touch America seeks to use this Commission as a tool in litigation pending before the FCC.

Furthermore, Touch America's complaints before the FCC do not involve local competition issues at all. Rather, they allege that Qwest's in-region dark fiber and lit fiber

capacity IRU transactions (1) amount to the provision of in-region interLATA services in violation of section 271, and (2) violate the terms of the FCC's U S WEST-Qwest merger orders regarding divestiture of such services.² The FCC has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, not imported into the consideration of section 271 applications.³ In its most recent section 271 order, the FCC also expressly rejected the idea that the section 271 process should "resolve all complaints, *regardless of whether they relate to local competition*, as a precondition to granting a section 271 application."⁴ Touch America's complaints have demonstrated no relationship to such local competition issues, involve a dispute about the scope of the FCC's own merger orders, and are not relevant to this wholly separate 271 application proceeding. Additionally, in this same section 271 order, the FCC rejected an attempt by intervenors to address issues in a section 271 docket that are already pending before the FCC in another docket because they relate to "open issues before [the] Commission" in another proceeding.⁵

¹ Preliminary Report on Qwest's Compliance with the Public Interest Requirement, Dkt. D2000.5.70, Montana Public Service Commission, (2/14/2002).

² Touch America also mentions other pending proceedings in federal district court in Colorado. See Touch America's Motion at 2.

³ See Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 ¶ 79 (2001) (noting that concerns with "Verizon's compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission's" merger audit proceedings, not the public interest inquiry).

⁴ Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, FCC 02-147, CC Docket No. 02-35, ¶ 305 (rel. May 15, 2002) ("*BellSouth Georgia/Louisiana Order*") (emphasis added).

⁵ *BellSouth Georgia/Louisiana Order* at ¶ 208.

The FCC previously approved the Qwest transactions at issue,⁶ in light of Qwest's formal Divestiture Compliance Report detailing the aspects of its plans for complying with section 271 prior to the merger. That report specifically stated that Qwest was not planning to unwind any pre-existing sales of IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity," and that it "intend[ed] to continue selling similar telecommunications facilities in the future."⁷ As the FCC subsequently concluded: "Based upon the description of the customers, services and assets being transferred to Touch America," the "proposed divestiture . . . will ensure that Qwest will not provide prohibited in-region interLATA services."⁸ Qwest has also demonstrated to the FCC in response to Touch America's complaints that the sale of IRUs constitutes the conveyance of network facilities, not the provisioning of "telecommunications services." As the FCC has held, "the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the section 271/272 framework that governs interLATA services."⁹

In addition, Touch America's motion appears to assume that lit IRU is an unbundled network element ("UNE"). This assumption is incorrect, and Qwest has not suggested otherwise. An IRU is a facility which is defined as "a facility or equipment used in the

⁶ See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation, *Touch America, Inc. v. Qwest Communications International Inc.*, FCC File No. EB-02-MD-003 (Mar. 4, 2002).

⁷ Divestiture Compliance Report, *Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC CC Docket No. 99-272, at 28-30 (filed Apr. 14, 2000).

⁸ Memorandum Opinion and Order, *Qwest Communications International Inc. and U S WEST, Inc.*, 15 FCC Rcd 11909 ¶¶ 5, 13 (2000).

⁹ See, e.g., Second Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 12 FCC Rcd 8653 ¶ 54 n.110 (1997).

provision of a telecommunications service”¹⁰ The FCC has previously ruled that the provision of UNE does not itself constitute the provision of “telecommunications.”¹¹ In describing the types of capabilities that constitute facilities, Qwest has pointed to the FCC’s characterization of undersea IRUs, satellite transponder capacity, and UNEs. Qwest has not suggested that an IRU is a UNE; Touch America’s confused statement that Qwest has done so is a misreading of Qwest’s argument in the matters pending before the FCC. The Staff of this Commission appropriately concluded that such questions are most appropriately resolved by the FCC, and Touch America has advanced no reasons why that conclusion was incorrect. Because IRU is not a UNE, Touch America’s allegations regarding the provision of IRU is not relevant to this proceeding.

The lack of foundation of Touch America’s motion is further demonstrated by Touch America’s misunderstanding of the application of Section 272(c). Touch America asserts that Qwest’s 271 application should be denied because Qwest affiliate, Qwest Communications Corporation (“QCC”), violated nondiscrimination provisions of 272(c). Touch America’s argument is fundamentally flawed because 272(c) applies to Qwest Corporation, not QCC. Touch America’s allegations have nothing to do with local competition, local service or Qwest Corporation, so its allegations have no bearing on this proceeding.

B. Touch America’s Motion is Untimely.

As a final reason for denying Touch America’s motion, it is untimely. Rule 256 provides that “[a] motion requesting substantive relief on fewer than fourteen (14) days’ notice will not be acted upon on fewer than fourteen (14) days notice” unless it makes certain statements not

¹⁰ 47 U.S.C. § 153(29).

contained in Touch America's motion. Rule 256.02. Touch America, as a party to this docket, was aware that the Commission had scheduled a decision meeting on June 6, 2002, to consider whether to issue a final decision approving Qwest's 271 application. Touch America waited until June 4, 2002 to file its motion to stay these proceedings, giving rise to the appearance that Touch America intends the mere presence of its motion, rather than its merits, to stay these proceedings. Under similar circumstances the public utilities commission of the state of Washington ruled from the bench that Touch America's motion to stay proceedings should be denied as untimely. This Commission should likewise deny Touch America's untimely motion.

For the above reasons, Qwest respectfully requests the Commission to deny Touch America's motion to re-open issues.

RESPECTFULLY SUBMITTED this 5th day of June, 2002.

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¹¹ Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 157 (1997), *aff'd sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).